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OFFICE OF THE PUBLIC DEFENDER

COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

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DELAWARE SUPREME COURT CASES
APRIL 1, 2009 THROUGH JUNE 30, 2009

WEBER V. STATE, (4/22/09):LIO INSTRUCTION/IMPROPER COMMENTS TO JURY/IMPROPER COMMENTS TO DEFENDANT AND COUNSEL/THREAT TO HOLD DEFENDANT IN CONTEMPT/JURY ACCESS TO STATE'S LAPTOP/MJAQ/RIGHT TO CONFRONTATION/IDENTIFICATION INSTRUCTION/CONTINUANCE REQUEST/HABITUAL OFFENDER/SPEEDY SENTENCING

Someone attempted to wrestle away car keys from a 74-year-old V at a gas station. One officer responded to the gas station where he obtained a description of the assailant. At the same time, another officer happened to respond to reports from a nearby development of someone knocking on doors looking for a ride to an unknown location. That officer arrested D. V could not identify D as his assailant, even though D met the description. Later, after viewing surveillance footage, police identified D as the assailant. D was convicted of Attempted First Degree Robbery and Attempted First Degree Carjacking then declared a habitual offender.

D made several arguments on appeal. First, the judge denied his right to a fair trial when he denied D's request for a lesser-included-offense instruction, engaged in *ex parte* communications with the jury, made improper statements to D and his counsel and allowed the jury access to the prosecutor's laptop. D also argued that the judge: erred in denying his motion for a judgment of acquittal; abused his discretion by denying D's motion for a continuance; violated his due process rights when he sentenced him as a habitual offender; violated his speedy-sentencing right when he allowed an almost three-year delay between his conviction and sentencing. The Court reversed on the lesser-included-offense issue but affirmed on the remaining issues.

LIO INSTRUCTION: The judge denied D's request for a jury instruction on Offensive Touching finding that it is not a lesser included offense of First Degree Robbery. However, the commentary to the Delaware Criminal Code sets forth Offensive Touching as a lesser included offense of First Degree Robbery. The Court concluded that if the jury did not find V's testimony credible then it could have concluded that the State failed to prove beyond a reasonable doubt that D attempted First Degree Robbery. Offensive Touching focuses on D's state of mind, not V's reaction. The Court reversed defendant's conviction of First Degree Robbery.

JUDGE'S IMPROPER COMMENTS TO JURY: The judge had engaged in unnecessary and "folksy" commentary with the jury. Also, there was at least one *ex parte* communication with the jury. On appeal, the Court found this to have resulted in a needless waste of resources on appeal. "[T]here should never be occasion for a judge to engage in any *ex parte* communications with the jury." The Court applied a harmless error analysis. Since D cited no specific prejudice, the judge did not discuss any legal issues and the judge made no reference to D or particular facts of the case the communications were harmless error.

COURT'S INAPPROPRIATE COMMENTS TO D's COUNSEL: D argued that 3 exchanges between the judge and defense counsel, which all occurred at sidebar, denied him a fair trial. The judge made a joke at counsel's expense and made inappropriate and unfriendly comments toward defense counsel. D did not support this claim with evidence of how the judge's comments unfairly prejudiced him. Under a plain error standard, the Court held that the record did not reveal that the judge was biased or hostile towards defense counsel.

COURT'S THREAT TO HOLD D IN CONTEMPT:

The Court held that the trial judge acted within his discretion when he threatened D with contempt when D interrupted the judge twice with statements unrelated to the judge's question. Contrary to D's claim, the threat did not have a "chilling effect" on D's ability to present a defense because defense counsel had already made a strategic decision not to put on the defense.

JURY ACCESS TO STATE'S LAPTOP: The jury was given access to the State's laptop and everything on it, including that which was not in evidence, during deliberations in order to watch a CD containing surveillance footage of the incident. This was done so the jury could see the assailant's face more clearly. The prosecutor said that the laptop belonged to his son and, therefore, contained no materials related to the case. The record did not rebut this representation, so, the judge acted within his discretion.

MOTION FOR JUDGMENT OF ACQUITTAL: D moved for judgment of acquittal on all counts arguing that there was insufficient evidence of identity. The Court affirmed the judge's decision. The surveillance tape enabled the jury to make its own determination. Additionally, one of the officers who was familiar with D and reviewed the surveillance tape identified D as the assailant. The officer's identification was admissible under *D.R.E.* 701 because it was a lay opinion that was: rationally based on his perception; helpful to understanding his testimony regarding why he arrested the defendant after initially releasing him; and it was not based on scientific, technical or other specialized knowledge. In addition, D fit V's initial description and was stopped approximately 150 yards from the gas station.

RIGHT TO CONFRONT WITNESS: D claimed he was denied his right to effectively cross examine the officer because he was not allowed to admit his driver's license into evidence. D's license contained a restriction requiring him to wear glasses while driving. D claimed this was relevant since the assailant in the surveillance video did not wear glasses and D did not have on glasses when he was arrested. The Court ruled that there was no error since defense counsel cross examined the officer on two occasions regarding D's driving restriction.

IDENTIFICATION INSTRUCTION: D also argued that the judge was required to give an instruction on the essential element of identification. However, an identification instruction was given and D failed to object to it.

CONTINUANCE REQUEST: D had requested a continuance on the grounds that W, who was to testify as an expert, was sick and unable to appear in court. W was to testify about the effects of D's medication in order to attack the element of "intent." According to D, he also planned to call his treating doctor and other witnesses. The judge denied this request. D claimed that the denial of the request left him unable to present the defense. On appeal, the Court found no abuse of discretion because the testimony was not central to the defense. W was not D's treating physician, there were other witnesses available who D chose not to call and there was no notice of an insanity defense or expert testimony regarding mental condition. Thus, the testimony would not have been beneficial to D based on Super.Ct.Crim.Rule 12.2.

HABITUAL OFFENDER: D argued that he was denied his right to due process when he was sentenced as a habitual offender based, in part, on a prior forgery conviction. He had not had the right to appeal the forgery because he only received 30 days in jail. The H.O. statute, 11 *Del. C.* § 4214(a), does not expressly require that a predicate conviction be final or appealable. In addition, D could have filed either a motion for postconviction relief or a writ of certiorari. D's failure to do either detracted from his due process claim. The Court ultimately held that there is no requirement that a conviction be appealable in order to be a partial basis for a habitual offender designation.

SPEEDY SENTENCING:
The Court applied the *Barker* balancing test to determine whether D was denied his right to a speedy sentencing. Two factors weighed in D's favor: the length of delay (close to 3 years); and he asserted his right. However, the reason for the delay was mainly due to the large number of postconviction motions filed by D, and there was no allegation of prejudice from the delay.

STATE V. ADKINS, (4/14/09):OPERATION OF A MOTOR VEHICLE CAUSING DEATH

The State appealed from an order granting D's motion to declare 21 *Del. C.* § 4176A, (Operation of a Motor Vehicle Causing Death), unconstitutionally vague. The Court concluded that *Hoover v. State*, which holds that § 4176A is constitutional required reversal. D alternatively argued that § 4176A violates due process by imposing too harsh a sentence (potential 30 month prison sentence) or by causing grave harm to a D's reputation without requiring proof of *mens rea*. The Court declined to make a determination on this question on ripeness grounds, since there has not yet been a trial in this case and the facts were not yet fully developed.

HARPER V. STATE, (4/14/09): IMPEACHMENT WITH SPECIFIC INSTANCE OF CONDUCT/*D.R.E.* 608(B)

D was convicted of multiple counts of sex-related offenses. On appeal, D claimed that the trial court abused its discretion by permitting the State to cross-examine him about his use of a false name when interviewed by police about a shoplifting of which he was never charged.

The Court must consider 4 factors when determining whether impeachment evidence is admissible: whether testimony being impeached is crucial; the logical relevance of the impeachment evidence to the question at bar; the danger of unfair prejudice, confusion of the issues and undue delay; and whether the evidence is cumulative. Here, the first and third factors weighed heavily in favor of the State, while the second and fourth factors were slightly in D's favor.There was no abuse of discretion.

JENKINS V. STATE, (4/6/09):PRETEXTUAL STOP/STRIP SEARCH

Police followed D to an apartment complex because he had an inoperative tag light and a license plate obscured by dirt. D pulled into a parking space and got out to go see his son. Police pulled up behind him and ordered D back in the car. D complied. When the officer came up to the driver side of the car, he smelled a strong odor of Marijuana. No contraband was found as the result of a frisk of D and his jacket. After another officer arrived, they placed D in a patrol car and searched his car. During the search an officer found remains of a marijuana cigarette, marijuana seeds, a stem, and drug paraphernalia. When the officer returned to the patrol car, he noticed that it now smelled strongly of marijuana. The officer took D to the station and conducted a strip search. The officer located 11.61 grams of cocaine in D's boxer shorts. D was convicted of Trafficking in Cocaine (10-50 grams), two counts of Possession of Drug Paraphernalia, and Failure to Have a Tail Light.

On appeal, D argued: the officer made the traffic stop as a pretext to conduct an illegal search; there was no justification to extend the stop beyond a normal traffic stop; and the strip search was improper. The Court found that D's claim that pretextual stops violate Article 1, Section 6 of the Delaware Constitution was not properly presented and was therefore waived.

The Court then found that the officer had probable cause to arrest D for driving under the influence due to his behavior and the marijuana odor. Thus, police had authority to conduct a search that would ordinarily be beyond the scope of a traffic stop. Additionally, the bulge in D's pants, the marijuana odor, D's actions, and the fact that a bag fell to the ground from D's leg established grounds for the officer to strip search D.

HARDWICK V. STATE, (4/22/09): MISSING WITNESS INSTRUCTION

Among other things, the two complainants were alleged to have engaged in group sex with D and D's nephew, W. Near the time of trial, W lived out of state. Police interviewed W who claimed that he had not been involved in any sexual acts with the complainants or D. D attempted to secure W's appearance but failed to issue an out-of-state subpoena which would have required him to show. At the time of trial, the State had not charged W with any wrong doing. W did not appear and D twice asked to make a missing witness argument. D was convicted of several counts of rape and attempted rape.

A missing witness inference is permissible when it would be natural for the party to produce the witness if his testimony was favorable. "[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable." Here, the Court concluded that "it was not 'natural' for the State to call" W because one complainant testified that he was involved in the sexual conduct while the other complainant indicated that he was not. "Thus, his presence, regardless of his testimony, would only further highlight the inconsistencies between the two girls' statements." Further, "he was not peculiarly within the State's power to call as a witness because his identity was known to both parties and he was equally available (or unavailable) to both parties." There was no error.

BURNS V. STATE, (5/4/09) : WITNESS OUTBURST/ ACCESS TO VICTIM'S THERAPY RECORDS/ 3507 EXHIBITS

This was a "he said/she said" case based on allegations made by D's nieces several years after alleged sex offenses occurred. The Vs told their parents, and were then interviewed by the Child Advocacy Center ("CAC"). In preparation for the CAC interviews, Vs made notes which were destroyed after the interviews. There were inconsistencies between the Vs' stories as well as the parents' statements. Prior to trial, Vs went to see a therapist. D moved to compel production of their therapy records for *in camera* review pursuant to Superior Ct.Crim.Rule 17. This motion was denied.

At trial, the Vs' father made an outburst that could be heard outside the courtroom. He wanted to know whether D "stuck his penis in their [Vs'] vagina." D objected. The judge told counsel to "sit down" then excused the jury. The judge then found the outburst to be calculated. However, she denied the motion for a mistrial. A 2-hour delay occurred before the judge issued a curative instruction.

Over D's objection, the judge refused to send the videos of Vs' 3507 statements back to the jury. At the end of the trial, the jury convicted D of all charges related to one V. However, they acquitted or hung on the charges related to the other V. Interestingly Vs' told the same story about one incident that allegedly involved both of them.

3507 VIDEO STATEMENTS: The Court upheld the decision not to send the video tapes back to the jury as it was not an abuse of discretion under *Flonnery v. State* in that tapes were not: 1) agreed to be entered by both sides; or 2) requested by the jury.

WITNESS OUTBURST: The Court found no *per se* rule for declaring a mistrial where there is a calculated outburst. Rather, the four factors of *Taylor v. State* - the nature/persistence/frequency of the outburst; the likelihood of prejudice to the jury; the closeness of the case; and the mitigating effect of the curative instruction - must be balanced in order to come up with an appropriate remedy. The Court found that only one of these factors favored the D (closeness of the case) and as such the motion for a mistrial was properly denied because the curative instruction was adequate.

DISCLOSURE OF THERAPY RECORDS: The Court concluded that the judge abused her discretion when she refused to conduct an *in camera* review of Vs' therapy records. D followed the procedures under Rule 17 in an effort to obtain a subpoena for the records. He made a proper showing warranting an *in camera* review "to determine whether disclosure of those records was necessary to protect [D's] Sixth Amendment Confrontation right." There are competing rights in that Vs have a privilege under *D.R.E.* 503 (a) and D has a 6th Amendment right.

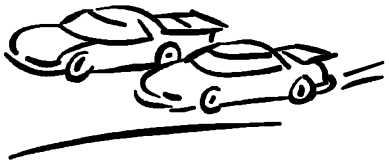
"[B]ecause Burns sought only the factual information contained in those therapy records, his request was sufficiently precise and narrow." He sought this information for impeachment purposes. The Court held that *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) controlled. In *Ritchie* the Court allowed for an *in camera* review of privileged records "where, as here, the privilege is invoked to bar discovery of potentially relevant evidence." D need make only a "plausible showing that the records sought are material and relevant." Here, The Court remanded the matter for an *in camera* review. If the review reveals information that "probably would have made a difference in the trial," a new trial is required. Otherwise the convictions stand.

CRAWLEY V. STATE, (5/5/09): PHYSICAL INJURY/ASSAULT SECOND DEGREE

D and Co-D attempted to rob a gas station. D shot V1 in the hand with a BB gun. After V1 locked himself in office and called police, D and Co-D left. Fifteen minutes later they went to another gas station and stole cigarettes and $200. D shot V2 in eye and Co-D punched him. D and Co-D later arrested and charged with several robbery and related offenses. One charge was assault second degree with respect to V1. D was convicted of several of the offenses including that assault. Because V1 testified that, even though he was shot in the arm, he "didn't have no injury" and there was no mark on

his hand, the Supreme Court found no physical injury existed. Thus, D was not guilty of assault second degree. Also, D could not be guilty of attempted assault second degree because that offense requires intent. There was no indication whether the jury found D guilty of the greater offense of assault due to intentional rather than reckless behavior.

STATE V. BROWER, (5/5/09): LESSER INCLUDED OFFENSES



D's car was next to Co-D's car at a red light. The two revved their engines in anticipation of an impromptu drag race. The light changed and the two sped down the road with D in the lead. As D approached an intersection, still in the lead, he slowed down in time to avoid V's car, but Co-D continued through the intersection, striking V at near 100 mph. D was charged with manslaughter following V's death. Co-D, the one who struck V, pled to manslaughter and testified at D's trial. Over D's objection, the court instructed the jury on the lesser included offense of Criminally Negligent Homicide. D was convicted of that offense. After trial, the judge ordered a new trial after deciding that he should have instructed the jury *sua sponte* on the lesser included offenses of Vehicular Homicide Second and Operation of a Vehicle Causing Death.

On appeal, the State argued that the judge erred as a matter of law when he ordered a new trial. The Court ratified and reaffirmed its "adherence to the party autonomy rule," which holds that as a matter of trial strategy, instructions on lesser included offenses should not be given absent a request from one of the parties. Instructing the jury *sua sponte* on lesser-included offenses, the Court held, would "contravene the autonomy of the parties to choose their trial strategies." Here, the Court found, D was engaged in an "all-or-nothing" strategy and as such it was improper for the trial court to give *sua sponte*, lesser-included-offense instructions. Thus, the matter was remanded for an entry of judgment and sentencing.

KOLODI V. STATE, (5/12/09): BOOT CAMP SENTENCES

D pled to PWITD and Maintaining a Dwelling then was ordered to Boot Camp Diversion. D received a Level V sentence on the possession charge which was to be deferred for placement in boot camp and aftercare. D was held at Level V for 4 months

before Boot Camp which he later completed. He then violated his probation. The Court held that D was entitled to credit for time he spent holding at Level V for Boot Camp.

SANABRIA V. STATE, (5/15/09): HEARSAY/BACKGROUND INFORMATION

Police received a call that a male was on the back porch of a home. At trial, the State asked the officer what information he was given when dispatched to the house. D objected as to hearsay. The court overruled and the officer relayed what he learned about D's description. He also said that he learned that an alarm company reported that an alarm was activated in the home. He explained that when he got to the house he went to the back from the front due to another report of an alarm activated in the foyer. D again objected to hearsay and was overruled. The officer noticed the back door was pried open. A witness then told the officer she saw D, so the officer chased and arrested D. Nothing was missing from the home, but items had been moved.

On appeal, D argued that the inadmissible hearsay allowed the jury to infer that D was in the house at the time the motion detectors went off. The Court recognized that background information is important for context but it can also be unfairly prejudicial to D. It held that "where the background can be provided as based 'upon information received' neither the contents of a third party's out-of-court statement nor evidence of other bad acts should be presented to the jury." If the out-of-court statement is necessary then court has to do a probative/prejudice balancing test. Here, "information received" would have been sufficient. Even if not, then undue prejudice as no physical evidence that he entered the dwelling. Thus, information that motion sensor went off inside the house established an element of the offense. REVERSED.

WATERS V. STATE, (5/20/09): BENCH TRIALS/ CLOSING ARGUMENTS

D had a bench trial on two counts of Rape Second Degree. The charges were based on "consensual" oral sex that occurred between D, 20 years old, and a fourteen-year-old complainant. At the conclusion of the evidence, the trial judge stated that the State's position was relatively clear and that he was inclined to hear D's argument as to why the complainants were making up the allegations. Without objection, D presented his closing argument, the State responded, then D replied. The judge found D guilty of only one of the rape charges. D received 10 years in prison.

On appeal, D argued that the judge violated his right to a fair trial and Superior Ct. Crim. Rule 29.1 when he required D to argue first. The Court never reached the Constitutional issues but found that the language of Rule 29.1 was clear that the "prosecution shall open the argument." The defense "shall be permitted to reply." The prosecution shall then be permitted to reply in rebuttal." The procedure followed in this case violated the mandatory language of the rule, so D's conviction was REVERSED. [UPDATE: on remand, D pled to rape fourth and got time served plus probation.]

STATE V. FLETCHER/ELLIS, (5/27/09): EXPUNGMENT OF JUVENILE DELINQUENCY RECORDS/ JUVENILE SEX OFFENDER REGISTRATION

D's were each adjudicated delinquent for sex crimes they had each committed when they were 13 of 14 years old. Several years later, and without any subsequent adjudications, they each petitioned for expungement of their juvenile record. Family Court granted these petitions.

On appeal, the two cases were consolidated. The State argued that neither D qualified for expungement under 10 *Del.C.* § 1001 because they were required to register as sex offenders. Alternatively, if expungement is permitted, Ds should be required to continue registration. Under section 1001, an expungement is permitted as long as: 1) three years have lapsed since the adjudication without subsequent adjudications; 2) there is no "material objection;" and 3) no reason appears to the contrary.

The Court held that there was no irreconcilable inconsistency between the expungement statute and the sex offender registration statute. The S.O. statute used to require the destruction of all records related to juvenile delinquency once the D reached age 25 without any further adjudications. This was subsequently eliminated. The current expungement provision regarding juvenile delinquency can be harmonized as it allows for destruction of records on petition to the court. Sex offender registration status is evidence of an arrest, thus when expungement ordered, D is no longer required to continue to register. Being a registered sex offender, without more, does not constitute a "material objection." When adjudication is expunged, it is as if it never happened. So, registration can not continue to be required. The Court affirmed.

CAMPBELL V. STATE, (5/27/09): *GETZ*/DRUG USER LAY TESTIMONY/ REBUTTAL EVIDENCE

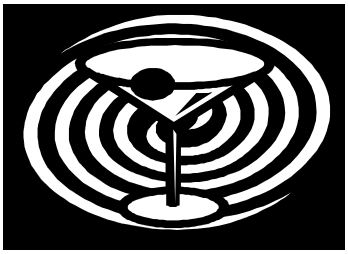
D sold drugs to W four times and arranged for a fifth transaction. Police executed warrants as part of a drug investigation that thwarted the fifth sale. At trial, State was permitted to present evidence, obtained through a wiretap and GPS tracking of W, of the future drug deal. Additionally, W was permitted to testify that the drugs involved were, in fact, "meth." D convicted of trafficking in and delivering Methamphetamine.

On appeal, D argued that the trial court erred when it found that evidence of the future drug sale was relevant to show a plan or scheme under *D.R.E.* 404(b) and denied his motion to exclude that evidence. The jury was instructed to only consider this as evidence of intent. The Court held that the trial judge did not abuse his discretion. Applying the *Getz* analysis, the Court concluded that the evidence was material to identifying D as part of a trafficking scheme. The evidence was consistent with evidence obtained through GPS tracking and, thus, was sufficiently plain, clear and conclusive. The judge did not abuse his discretion by instructing the jury to use this evidence for purposes of intent, as opposed to a plan.

D also argued that the trial court erred when, over D's objection, it refused to exclude the testimony of the downstream customer who testified that the substance at issue was "meth." The Court relied on its decision in *Wright v. State* when it upheld the trial court's decision. The witness was a 15 to 20 year meth user; a middleman who sold him the drugs said that it was "meth;" the substance made him feel the way meth usually does; and substance looked, felt and tasted like meth. Because he had past experience with and present knowledge of "meth," his lay testimony was admissible.

Finally, the Court held that the judge properly allowed rebuttal evidence regarding the GPS tracking evidence to impeach testimony regarding a W's whereabouts on the day of an alleged drug sale.

STICKEL V. STATE, (6/16/09): VICTIM'S TOXICOLOGY REPORT/ RELEVANCE



D convicted of 2 counts each of Vehicular Homicide in the Second Degree and Driving a Vehicle Under the Influence of Alcohol. While driving his SUV, D turned left then struck and killed two motorcyclists traveling in the opposite direction. At trial the State, over objection, introduced toxicology reports showing that neither V had drugs or alcohol in his system at the time of the accident.

On appeal, D argued that the trial court abused its discretion by admitting the toxicology reports because they were irrelevant and lacked probative value. The Court held that the reports were properly admitted under *D.R.E.* 401 & 402. They provided evidence for the jury to consider when determining whether the accident was caused by D's criminally negligent behavior or Vs' dangerous behavior. D had put Vs' conduct at issue, implying it was their dangerous behavior that caused the accident. The judge properly exercised his discretion in allowing the admission of the reports.

NORMAN V. STATE, (6/16/09): RIGHT TO COUNSEL DURING MENTAL HEALTH EXAMINAITON/ DEATH PENALTY STATUTE NOT VAGUE OR OVERBROAD AS APPLIED/ DEATH FROM OTHER STATE SUFFICIENT AS AGGRAVATING CIRCUMSTANCE FOR DEATH SENTENCE/ INSTRUCTION ON LAW FROM OTHER STATE REGARDING DEFENDANT'S LACK OF CRIMINAL RESPONSIBILITY FOR DEATH

D went on a shooting spree in Delaware and Maryland while hearing voices and having delusions. In the process, he paralyzed a woman, scared an old couple, killed someone in Delaware, killed someone in Maryland and killed a dog. D was arrested in MD then transferred to a psychiatric hospital. He was then indicted on charges in MD and shortly thereafter, he was indicted on charges in DE. He was represented by MD PD's office but had not made any appearance in DE or been assigned a DE PD.

In the mean time, D was evaluated by 2 psychiatrists: 1 retained by the MD PD; and 1 ordered by the MD court. Both doctors found D "lacked the substantial capacity to appreciate the criminality of his conduct and to conform to the requirements of the law." Subsequently, DE and MD prosecutors jointly retained another psychiatrist to evaluate D under both MD and DE law. D still had no DE attorney and DE DAG never notified a DE court that they were sending a doctor to evaluate him. This doctor gave the same opinion as to D's state of mind. However he further concluded that D's actions were a result of substance-induced delirium. As a result, D was not able to meet DE's narrow standard for "not guilty by reason of insanity" ("NGRI") or "guilty but mentally ill" ("GBMI"). MD *nolle prossed* its charges and D was extradicted to DE because all the doctors agreed that he was "not criminally responsible" for the death in MD.

Prior to trial, D moved to preclude the State from using the MD death as an aggravating factor for the death penalty based, in part, on the fact that the consensus of the doctors was that D was not criminally liable for the death under MD law. The trial court ruled that the jury could consider the MD death but the jury was provided with no instruction on MD law and was told that culpability for that death would be measured under DE law. D also moved to preclude the State's use of its doctor's testimony, on the grounds that the State violated D's Sixth Amendment right to counsel. The trial court found a constitutional violation but ruled that it was harmless error. The State was permitted to use the testimony as rebuttal to D's NGRI defense.

The jury rejected D's mental-health defense and found that the State had established the requisite aggravating circumstance - "causing the death of two people." In a 12-0 vote, the jury recommended death. The judge agreed.

RIGHT TO COUNSEL DURING PSYCHIATRIC EVALUATION: On appeal, the Court concluded that D's Sixth Amendment Rights were violated when he did not have access to DE counsel at the time DE prosecutors sent a doctor to evaluate him. Counsel must be given advance notice of the nature and scope of a psychiatric evaluation, as well as be given an opportunity to consult with the accused. The State was also required to inform the Court of the evaluation. The Court ruled, however, that the opinion was still admissible under the Inevitable Discovery and Independent Sources Doctrines. Since a mental-health defense was the only reasonable defense strategy available it was inevitable that D's statements would have been discovered during the

course of a lawful investigation. In order to assert a mental illness defense in DE, D must submit to an evaluation of the State's chosen expert anyway. Also, DE could have taken the evaluation conducted for MD and have it later applied to DE law.

DEATH PENALTY STATUTE NOT VAGUE OR OVERBROAD AS APPLIED: The Court ruled that section 4209(e)(1)k is not vague and overbroad as applied. The Eighth Amendment requires that a statutory circumstance genuinely narrow the class of persons eligible for death. In this case, a sentencer could not fairly conclude that an aggravating circumstance applies to every D eligible for the death penalty, it only apples to a convicted D who has caused the death of two or more people. The narrowing factors have a common sense core of meaning that juries are capable of understanding.

DEATH FROM OTHER STATE AS AGGRAVATING FACTOR: The Court concluded that it was permissible for the sole aggravating factor, under Section 4209 (e)(1)k to be "the death of two or more people," when the second death occurs outside of DE's jurisdiction. DE and many other states have a history of admitting evidence of criminal conduct in other states for sentencing purposes. Many other states have also used evidence of unadjudicated criminal conduct from a different jurisdiction in regards to statutory aggravators. In the present case, the jury was required to find the existence of the MD death beyond a reasonable doubt.

INSTRUCTION ON LAW FROM OTHER STATE REGARDING DEFENDANT'S LACK OF CRIMINAL RESPONSIBILITY FOR DEATH: The Court concluded that the trial court was required to instruct the jury on applicable MD law with respect to the second death. Because the MD death was used as an aggravating factor, D's lack of criminal responsibility in that jurisdiction is a relevant mitigating factor that must be considered by a judge and jury. The Eighth Amendment requires that a court consider any mitigating circumstance. The lack of instruction on MD law made it impossible for the jury to determine the existence of a mitigating circumstance. D's death sentence was reversed and the matter was remanded for a new penalty hearing. [UPDATE: On remand, D received a life sentence].

LECATES V. STATE (6/19/09): POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED/POSSESSION OF A DEADLY WEAPON DURING THE COMMISSION OF A FELONY

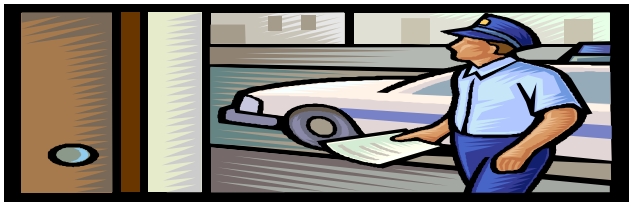
In response to "shots fired" police blocked in a Pontiac and a Chevy, cars that matched the description in the report, at a Wawa. Two people were in the Pontiac, no one was in the Chevy and D stood between the two cars. D, a person prohibited, claimed to know nothing about the Chevy so the officer deemed it abandoned and searched it. He

found a pistol under the arm rest of the front bench seat. He also found the title to the car which was signed by D. D moved to suppress the gun arguing the car search was illegal. The motion was denied. D was found guilty of PDWBPP.

On appeal, D argued the search of the Chevy was illegal. The Court ruled that it was reasonable to infer, based on the matching description, that the cars at the Wawa were the same ones that left the shooting. It was also reasonable that D might have had information about the cars or shooting. Thus, there was a reasonable basis to temporarily detain D and the resulting inventory search was legal.

D also argued that there was insufficient evidence to support his conviction of PDWBPP. The Court conducted an in-depth analysis to clarify its prior law with respect to the definition of "possession" in the context of PDWBPP versus the context of PDWDCF. It concluded that to establish possession for purposes of PDWDCF, the State must prove accessibility and availability of the weapon during the commission of the felony. It is a limited definition. PDWPP, on the other hand, prohibits possession *per se*. Thus, to establish possession for purposes of PDWBPP, the State must prove that D: knew the location of the weapon; had the ability to exercise dominion and control over the weapon; and intended to guide the destiny of the weapon. PDWBPP does not require that a deadly weapon be physically available and accessible to D at the specific time of arrest. Here, the Court concluded that the facts supported a finding of possession.

DICKERSON V. STATE, (6/19/09): CARRYING A CONCEALED DEADLY WEAPON/RESISTING ARREST/LESSER INCLUDED OFFENSES

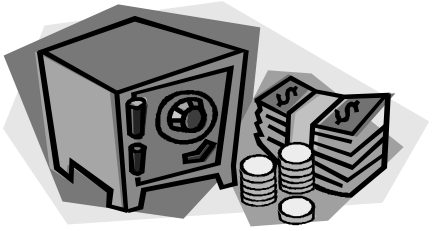


Police responded to D's property after receiving a call from D's neighbor that D had brandished a weapon at the neighbor. D initially refused to open the door for police. When he finally did, he refused to answer the trooper's questions regarding whether or not he was carrying a weapon. D then walked out of his trailer and towards D's car which was several feet away. For officer safety, the trooper attempted to arrest D. A struggle ensued. After D was arrested, the trooper found a .38 caliber pistol in D's pocket which was hidden underneath his shirt. D was charged with Carrying a Concealed Deadly Weapon and Resisting Arrest with Force and Violence (Felony). At trial, D testified that he did not resist. D requested a lesser-included-offense instruction on misdemeanor resisting arrest. This was denied. D was convicted as charged.

On appeal, D argued that CCDW cannot be constitutionally applied when D is on his own private property. The Court assumed, without deciding, that D had a right to carry a concealed weapon in his own home. However, D voluntarily walked out of his home with the weapon. D pointed to no evidence that police compelled him to leave his home. They only asked D to explain the earlier incident, show his hands, and state whether he had any weapons. These actions could have been performed within his home.

D also argued that there was insufficient evidence to satisfy the "force or violence" requirement of Felony Resisting Arrest or, alternatively, the judge should have provided a lesser-included-offense instruction for misdemeanor resisting arrest. The felony variety of RA was enacted in 2006 and had not previously been addressed. D argued there was no force or violence because he did not hit or attack the trooper. The Court held that a rational jury could find that D's pulling his hands away from the trooper during the attempted arrest constituted "force." Thus, trial court properly denied D's motion for a judgment of acquittal. And, because D's defense was that he did not resist arrest at all, the trial court did not err when it denied D's request for the lesser-included-offense instruction on misdemeanor resisting arrest.

MADDREY V. STATE, (6/15/09): POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY/ POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED



Police searched D's bedroom and found drugs and paraphernalia under a mattress and in a dresser drawer. On the top shelf of his closet, they found a locked safe. No key was found. After police pried the safe open, they found $2,000 and two handguns. DNA evidence linked D to the guns even though he denied knowing of their existence. D was charged with and later convicted of, *inter alia*, 2 counts each of PFDCF and PDWBPP.

On appeal, D argued that since the guns in question were in a locked safe and no key was ever located, the State could not prove "possession." The Court quickly dispensed with D's PDWBPP appeal- noting that the offense occurred if D had possessed the weapon "*at any time*." DNA and location of the guns was sufficient evidence to establish D possessed the guns at some point while prohibited.

The Court followed its holding in *Barnett*, which held that the fact that a deadly weapon is in a locked container is not dispositive, but rather one of the factors to consider when deciding whether D possessed a weapon during the commission of a felony. There needs to be accessibility and availability of the firearm during the commission of the felony. Here, the drugs and paraphernalia (which was the basis of the underlying felony) were found in the same room as the guns. The "locus of criminal activity" test was satisfied. Taking the evidence as a whole, a reasonable person could infer that D possessed the weapon in conjunction with the continuing felony of drug possession.